[2016] SAC (Civ) 002
X09/16

Sheriff Principal C A L Scott QC
Sheriff Principal M Lewis
Sheriff NMP Morrison QC

OPINION OF THE VICE PRESIDENT, SHERIFF PRINCIPAL C.A.L. SCOTT QC

in appeal by

LA

Appellant;

Against

JJH

Respondent:

Act: Giannelli; Gair & Gibson LLP, Falkirk
Alt: Walker; Nelsons Solicitors Falkirk Ltd, Falkirk

10 May 2016

[1] This appeal was brought to challenge the decision of the sheriff at Falkirk to grant a residence order in terms of section 11(2)(c) of the Children (Scotland) Act 1995 providing that the child JH should reside with his father, the respondent. (The sheriff's judgment appears to be undated and the note of appeal mentions both 8 and 9 January 2016 as being the date of the decision/interlocutor. However, nothing turns on this.)

[2] Read as a whole, the note of appeal challenged the sheriff's approach to the evidence led at a child welfare hearing. In various respects, it was contended that the sheriff erred in

making certain findings in fact. There was, however, no suggestion in the note of appeal as to what course of action should be adopted should the appeal be upheld.

[3] In terms of the respondent's note of argument, it was submitted, *inter alia*, that the findings in fact could not competently be challenged since the evidence (which was not the subject of agreement between the parties) had not been recorded; that the findings in fact were binding (see *Allardice* v *Wallace* 1957 SLT 225); that there was, in any event, evidence to support the findings in fact; that the note of appeal failed to propose alternative findings in fact; that in arriving at her findings in fact and conclusions on the evidence, the sheriff had properly exercised her judicial discretion; and that there was no challenge to the judgment of the sheriff on the basis that she had erred in law or had been so plainly wrong in the exercise of her discretion as to merit interference by an appellate court.

[4] The solicitor for the appellant in her oral submissions struggled, particularly, with the difficulty posed by the lack of any transcript of evidence. Initially, at least, she clung to the misguided notion that this court might, in some way, be able to place reliance upon her own *ex parte* statements as to what the evidence led had amounted to, all with a view to inviting the court to interfere with the sheriff's decision. The nature and extent of any such interference (should it have been merited at all) was somewhat vague in itself. At one stage, the appellant's solicitor suggested that the whole matter should be remitted back to the sheriff for all the evidence to be led anew.

[5] Inevitably, the solicitor for the appellant was forced to confront the difficulty in seeking to challenge the findings in fact in circumstances where no transcript was available. As such, she was invited by the court to identify any error of law on the part of the sheriff. She submitted that the sheriff had erred in law in failing to take account of the views of the child. However, that argument did not feature in the grounds of appeal and, in any event, it

was not a proposition upon which this court could be satisfied on the material before it. The views of the child were those recorded in a bar report which was not before this court and would have required to be looked at in the context of the whole report. It was on the basis of that report that interim residence was altered in favour of the respondent at an earlier child welfare hearing. No other errors of law were identified.

[6] Similarly, the court's attempt to elicit any argument based upon supposedly unwarranted conclusions drawn by the sheriff caused the solicitor for the appellant to revert back to criticism of the findings in fact themselves. Therefore, no relevant or meaningful argument was presented to challenge the sheriff's conclusions on the evidence.

[7] In such circumstances, it was plain that the appeal was entirely devoid of merit. Indeed, it was a matter of surprise to the court that the appeal should have been marked at all, framed as it was. At one stage during the appeal hearing, the solicitor for the appellant mentioned what she "hoped" would be the court's ability to review the evidence and the sheriff's findings. She was reminded that this court is not a court of review; it is a court of appeal.

[8] In light of the court's experience in the context of the present case, we find it necessary to issue a reminder to parties and practitioners intent upon bringing an appeal to challenge a sheriff's findings in fact. A prospective appellant must be aware that when the evidence has not been recorded (and absent agreement on all issues of fact canvassed in evidence) the sheriff's findings in fact are not open to challenge. They are binding upon the appellate court, which cannot make different, or further, findings in fact. (See *Macphail*, Third Edn at paragraph 18.109). In such circumstances, an appeal cannot competently be brought for that purpose.

[9] More generally, where the findings in fact cannot be challenged, for the sheriff's decision to be the subject of a viable appeal, an appellant must be able to point to a clear error of law on the part of the sheriff or to conclusions reached by the sheriff which are plainly wrong or unwarranted. An appellant must also have a clear understanding as to what the consequences ought to be (should the appeal be upheld) and the note of appeal must set out in specific terms what course the appellate court is being asked to follow.

[10] For the purposes of this appeal, it was never suggested that the procedure adopted before the sheriff, viz. the leading of evidence at a child welfare hearing had caused the court to err. Accordingly, for my part, I merely reserve my opinion as to the use of such procedure. Having regard to my observations within paragraphs [8] and [9] *supra*, whilst the procedure certainly restricts the scope of an appeal, it does not, of course, follow that the case was wrongly decided at first instance. Moreover, I am aware that the expedient of determining discrete issues in family actions through evidence being led in the context of a child welfare hearing is regarded by certain sheriffs as a valuable case management tool.

[11] The present appeal has been refused. An award of expenses against the appellant was, in the court's view, justified. However, we were informed that the appellant is in receipt of legal aid with a nil contribution. Accordingly, the award of expenses has been modified to nil.

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Sheriff Principal C A L Scott QC
Sheriff Principal M Lewis
Sheriff NMP Morrison QC

OPINION OF SHERIFF PRINCIPAL M LEWIS

in appeal by

LA

Appellant;

Against

JJH

Respondent:

Act: Giannelli; Gair & Gibson LLP, Falkirk
Alt: Walker; Nelsons Solicitors Falkirk Ltd, Falkirk

Edinburgh, 10 May 2016

[12] For the reasons given in the opinion of the vice President, I agree that the appeal should be refused. I too reserve my opinion on the general use of evidential child welfare hearings. In this case, that procedure had not been ordered by the sheriff but had been sought by the parties. The appropriateness of the use of an evidential child welfare hearing was not an issue focused in the grounds of appeal.

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Sheriff Principal C A L Scott QC
Sheriff Principal M Lewis
Sheriff NMP Morrison QC

OPINION OF SHERIFF MORRISON QC

in appeal by

LA

Pursuer and Appellant;

against

JJH

Defender and Respondent:

Act: Giannelli; Gair & Gibson LLP, Falkirk
Alt: Walker; Nelsons Solicitors Falkirk Ltd, Falkirk

Edinburgh, 10 May 2016

[13] I agree with the reasons given by the Vice-President for the refusal of this appeal. I wish only to add an observation of my own about evidential child welfare hearings.

[14] There is no such process as an evidential child welfare hearing provided for in the Ordinary Cause Rules: one may have a child welfare hearing or a proof. If it were possible to have an evidential child welfare hearing, it may only be, in my opinion, with the consent of parties. The reason for this is that such a hearing, without the recording of evidence, would restrict a party's grounds of appeal to questions of law only. An "evidential child welfare hearing" does not attract, automatically, the provisions of Chapter 29 (proof), in particular the authority to cite witnesses and the rules which arise from it, or the recording

of evidence. It so restricts the grounds of appeal because, without the recording of evidence, an appellate court cannot go behind the facts found by the sheriff. I do not think that rule 33.22A(4) (or rule 33A.23(4)) of the Ordinary Cause Rules 1993, which allows a sheriff to seek to secure the expeditious resolution of disputes, entitles a sheriff, at his or her own instance, to restrict a party's right of appeal by ordering this procedure without that consent. In this case, I understand that not recording the evidence was agreed to because legal aid was refused for the cost of recording it. This case highlights dangers in even agreeing to such a procedure.